No. 15-6418

IN THE
Supreme Court of the United States

GREGORY WELCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF INDIANA, ARKANSAS, MAINE, MICHIGAN, MONTANA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF THE COURT-APPOINTED *AMICUS CURIAE*

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QUESTIONS PRESENTED

1. Whether the district court erred when it denied relief on petitioner's Section 2255 motion to vacate, which alleged that his prior conviction for robbery under Fla. Stat. Ann. § 812.13(1) did not qualify as a violent felony under the Armed Career Criminal Act of 1984 ("ACCA").

2. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015)—which held that the residual clause of ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), is void for vagueness based on principles of procedural due process—nonetheless announced a new "substantive" rule of constitutional law that is retroactively applicable on collateral review under *Teague v. Lane*, 489 U.S. 288 (1989).

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INTEREST OF THE *AMICI* STATES

Federal habeas review of State criminal convictions intrudes on State sovereignty. When it grants habeas relief, a "federal court interferes with the execution of a state-imposed sentence and thus with the State's ability to enforce its courts' judgments, independently adjudicate constitutional questions, ensure the finality of its convictions and sentences, and administer its criminal and penal laws." J. Richard Broughton, *Habeas Corpus and the Safeguards of Federalism*, 2 Geo. J.L. & Pub. Pol'y 109, 113–14 (2004). "[T]he attendant burden that is placed upon a state's administration of justice, and upon the federal system, is quite real." *Id.* at 114. This is particularly true when the federal writ is predicated on a new rule of federal constitutional law that was never available to the state courts that adjudicated the case.

Over a quarter-century ago, the Court acted to limit the scope of that burden. In *Teague v. Lane*, 489 U.S. 288, 310–11 (1989) (plurality opinion), the Court held that new rules announced by the Supreme Court would not apply on habeas corpus if the rule was announced after the case became final on direct review, except for substantive rules of constitutional law and for watershed rules of criminal procedure. It recognized that "[t]he costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus generally far outweigh the benefits of this application." *Id.* at 310 (quotation omitted). Retroactivity "*continually* forces the States to

marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Id.* As a result, "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." *Id.* (quotation omitted).

Especially in light of *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016), *as revised* (Jan. 27, 2016), in which the Court held that States must provide at least as much retroactivity as the federal courts do, States have a strong interest in protecting a robust *Teague* retroactivity standard, and in thereby protecting the finality of criminal convictions and preserving existing limitations on the availability of collateral review and relief. The *Amici* States urge the Court to reaffirm that a constitutional holding is retroactive only when it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or when it articulates a new "watershed rule[] of criminal procedure[.]" *Teague*, 489 U.S. at 311 (quotations omitted).

SUMMARY OF THE ARGUMENT

The decision below should be affirmed for three reasons:

First, hundreds of state penal statutes contain similar language to the residual clause and may now be vulnerable to invalidation under *Johnson v. United States*, 135 S. Ct. 2551 (2015). If *Johnson* is retroactive, any state statute invalidations based upon *Johnson* may also be retroactive, thus permitting any defendants convicted under those state statutes to seek collateral review of their previously-final convictions.

Second, Petitioner takes the novel position that *any* Supreme Court decision holding "a law unconstitutional" must be "a substantive rule that applies retroactively on collateral review" because the invalidated law "is void, and is as no law[.]" Pet. Br. at 1, 13 (quotation omitted). Essentially, he asks this Court to overrule *Teague* and upset the carefully crafted balance that protects State sovereignty and interests in finality and comity. In its place, he advocates a return to pre-*Teague* general retroactivity. *Id.* at 36. And under the Court's recent decision in *Montgomery*, 136 S. Ct. at 729, States would be required to incorporate that general retroactivity into their own post-conviction relief systems. The result would likely be a vast increase in the number of state-level post-conviction petitions, further taxing States' already limited resources.

Third, that new burden on the States would not materially advance any significant liberty interest. The preference for finality of criminal adjudications is outweighed when a new rule places certain defendants or conduct "beyond the State's power to punish," *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), but vagueness cases do not extend so far. Rather, vagueness cases are about deficient statutory language regarding conduct that legislatures are free to proscribe. When a defendant is indisputably guilty of engaging in conduct that is not constitutionally protected, the defendant's interest in fair notice does not outweigh the State's interest in the finality of—and federal respect for—the conviction.

ARGUMENT

I. Many State Statutes May Be Vulnerable Under *Johnson*, So Retroactivity May Cause Numerous Final Cases to Be Revisited

Making *Johnson* retroactive would place potentially thousands of previously final state convictions and sentences in new and unjustified jeopardy. *Johnson* rendered hundreds of textually similar state penal statutes newly susceptible to invalidation, and when the Court makes a new constitutional rule retroactive, that rule becomes a permissible basis for a state post-conviction relief petition—even if a defendant has already filed unsuccessful petitions. So, if *Johnson* applies retroactively, *any* prisoner convicted under a comparable statute could collaterally attack that

conviction, even if it has already survived direct review and is now final.

In some situations, such as where specific actions once deemed criminal are now constitutionally protected, such outcomes may be justified. But where, as here, the underlying rationale for statutory invalidity is procedural rather than substantive, the Constitution surely does not demand that States bear this heavy burden.

The problematic textual formulation of the ACCA invalidated in *Johnson* was a portion of the definition of "violent felony" known as the "residual clause": any felony that "otherwise involves conduct that presents a *serious potential risk* of physical injury to another." *Johnson*, 135 S. Ct. at 2555–56 (quoting 18 U.S.C. § 924(e)(2)(B)) (emphasis added). Such statutory text is hardly unique; legislatures frequently use similar words to cast a wide net over hard-to-define criminal behavior.

The brief of the Court-appointed *amicus curiae* discusses several federal statutes that incorporate general liability standards akin to that invalidated in *Johnson*. *See* Br. of Amicus Curiae at 53–55. In addition, hundreds of state penal statutes "hinge criminal liability or sentencing consequences on a 'risk,' 'substantial risk,' 'grave risk,' or 'unreasonable risk' of physical injury to other people." Supp. Br. for the United States at 22–23, *Johnson*, 135 S. Ct. 2551 (collecting statutes).

In light of the Court's holding in *Johnson*, many of these statutes may now be at risk of invalidation. Again, the language at issue in *Johnson* was the definition of "violent felony" as "any crime that otherwise involves conduct that presents a *serious potential risk* of physical injury to another." *Johnson*, 135 S. Ct. at 2555–56 (quoting 18 U.S.C. § 924(e)(2)(B)) (emphasis added). But even though the Court acknowledged some crimes clearly fell within that description, it found the language unconstitutionally vague because courts did not apply it consistently. *Id.* at 2559–60.

That conclusion represents a significant change in the Court's void-for-vagueness doctrine. Before *Johnson*, it was settled that a statute was void for vagueness only if it was vague in *all* applications. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95 (1982). But *Johnson* rejected "the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp[,]" concluding instead that the residual clause was unconstitutionally vague because judges had trouble agreeing on how to determine whether conduct posed a "serious potential risk" of harm. *Johnson*, 135 S. Ct. at 2561.

Accordingly, under *Johnson*, a defendant challenging a penal statute as unconstitutionally vague need not show that it is vague as applied to his particular case, or that there is no set of circumstances in which the statute is clear. Rather, such a defendant need only demonstrate that close

cases have arisen in the past, or that judicial decisions applying it demonstrate a "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Id.* at 2560.

Given this new approach, if "substantial risk of serious physical injury" is unconstitutionally vague in the ACCA, similar language in other statutes could also be problematic. For example, Alabama law defines the crime of "reckless endangerment" as reckless conduct that "creates a *substantial risk* of serious physical injury[.]" Ala. Code § 13A-6-24(a) (emphasis added). Nevada law defines "crime of violence" in part as "[a]ny felony for which there is a *substantial risk* that force or violence may be used against the person or property of another in the commission of the felony." Nev. Rev. Stat. Ann. § 200.408.2(b)(2). In Indiana, resisting law enforcement, normally a class A misdemeanor, becomes a "Level 6 felony if while committing [the offense], the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a *substantial risk* of bodily injury to another person[.]" Ind. Code § 35-44.1-3-1(b) (emphasis added). If "serious potential risk" is vague, it is at least plausible that terms such as "substantial risk" could be vague as well, depending on the track record of enforcement.

To be sure, the majority in *Johnson* rejected the notion "that to hold the residual clause unconstitutional is to place [similarly worded]

provisions in constitutional doubt[,]" observing that most of the statutes the United States cited in its brief required courts to judge the riskiness of the defendant's actual conduct rather than of "an idealized ordinary case of the crime." *Johnson*, 135 S. Ct. at 2561. And, of course, the Court can expect States to offer robust defenses of their statutes against vagueness challenges predicated on *Johnson*.

But given *Johnson*'s plain alteration of the vagueness standard in favor of those challenging criminal statutes, States at this point take little comfort in the Court's disclaimer. Indeed, already, in *John Does 1–5 v. Cooper*, No. 1:13CV711, 2015 WL 8179498, at *10 (M.D.N.C. Dec. 7, 2015), the court invalidated a state statute prohibiting certain sex offenders from being present "[a]t any place where minors gather for regularly scheduled educational, recreational, or social programs." The phrases "regularly scheduled" and "where minors gather" were a problem because they encompassed "too wide a range of situations which would cause men of common intelligence [to] necessarily guess at [the statute's] meaning, or allow an essentially standardless sweep by law enforcement," *id.* at *12 (alterations in original) (quotations and citations omitted), even though "some places could clearly be identified as being restricted." *Id.* (citing *Johnson*, 135 S. Ct. at 2560–61).

In short, statutes that once seemed acceptably broad may now be vulnerable to constitutional attack under *Johnson*. What is more, under the *Johnson* standard, any such vaguely worded statutes

may be invalidated at the behest of criminal defendants whose conduct could plainly have been invalidated by a more precisely drawn statute. It is one thing for broadly worded statutes to be removed from a prosecutor's arsenal going forward. It is another to require re-examination of the convictions and sentences of everyone ever convicted under those statutes, thereby permitting the jailhouse doors to swing open prematurely for offenders whose underlying bad conduct remains validly subject to criminal sanction, even if the statute of conviction contains what amounts to a procedural flaw.

II. Petitioner's Implicit Repudiation of *Teague* Would Affect State As Well As Federal Post-Conviction Relief Systems

Petitioner's cavalier treatment of *Teague* fails to account for both its historical antecedents and its role in protecting finality and comity. As a result, Petitioner's retroactivity theory would reduce the power of *Teague* to protect the finality of state convictions and sentences, which would have an impact for both state and federal collateral attacks.

A. Before *Teague*, courts determined retroactivity under a flexible balancing test articulated in *Linkletter v. Walker*, 381 U.S. 618, 629 (1965). The *Linkletter* test required courts to consider "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* Courts then had discretion "to give retroactive effect to some new rules in some

cases but not others." *Retroactive Application of New Rules*, 122 Harv. L. Rev. 425, 434 (2008).

But "the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). Under *Linkletter*, retroactivity was so pervasive that federal habeas review frequently squandered state judicial resources. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chic. L. Rev. 142, 148 (1970). "State judges and attorneys general, Federal judges, and leading commentators" expressed "widespread dissatisfaction with the present system of Federal collateral review on grounds of federalism, proper regard for the independent stature of the State courts, the need for finality in criminal adjudication, and conservation of limited criminal justice resources." S. Rep. No. 98-226, at 6 (1983). Pre-*Teague* federal habeas review "undermine[d] Federal-State comity [and] impinge[d] on the finality of State trials." *Who Is on Trial? Conflicts Between the Federal and State Judicial Systems in Criminal Cases: Hearing Before Subcomm. of the H. Comm. on Gov't Operations*, 100th Cong. 126 (1988) (statement of Andrea Hillyer, Assistant General Counsel to the Governor of Florida).

In *Teague*, the Court adopted the view that new rules generally should not be available on collateral

review. Justice Harlan had long advocated this position, *Teague*, 489 U.S. at 303, and Justice Stevens, in the part of his concurring opinion joined by Justice Blackmun, agreed: "In general, I share Justice Harlan's views about retroactivity [D]efendants seeking collateral review should not benefit from new rules unless those rules free individuals from punishment for conduct that is constitutionally protected or unless the original trial entailed elements of fundamental unfairness." *Id.* at 319 (Stevens, J., concurring in part and concurring in the judgment) (quotations and citation omitted).

Even after *Teague*, many stakeholders urged further reform because "unnecessary delays [and] a seeming lack of finality of State criminal proceedings" tested "the credibility of the criminal justice system[.]" H. Rep. No. 103-470, at 1 (1994). Seven years after *Teague*, Congress enacted AEDPA, which embraced the "principles established by *Teague v. Lane*[.]" *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. 3 (1995) (statement of Sen. Orrin Hatch). AEDPA's "general principle" is that "Federal courts shall not grant a claim that was adjudicated in State Court proceedings." Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L. Rev. 888, 946 (1998) (quoting 141 Cong. Rec. S7842 (daily ed. June 7, 1995) (Statement of Sen. Joe Biden)).

AEDPA also curtailed the situations in which a petitioner could file a successive federal habeas

petition. Section 2244 barred a petitioner from raising a claim that had been raised in the initial petition. 28 U.S.C. § 2244(b)(1). It also limited the situations in which a petitioner could raise a new claim. If the new claim was based on a new rule of constitutional law, the petitioner must show that this Court "made [it] retroactive to cases on collateral review" and that it was "previously unavailable" to the petitioner. *Id.* (b)(2)(A); *Tyler v. Cain*, 533 U.S. 656, 662 (2001). In short, AEDPA "commanded a renewed respect for state courts and their judgments, a respect which recognizes their role as 'coequal parts of our national judicial system.'" Scheidegger, *supra*, at 953 (quoting *Sawyer*, 497 U.S. at 241).

Here, however, Petitioner contends that every unconstitutional penal statute is "void ab initio" such that all constitutional adjudications of statutes should have retroactive effect. The result would be substantial vitiation of AEDPA's "clearly established" requirement (and routine clearance of the "made retroactive" requirement for successive habeas petitions). A habeas petitioner cannot obtain relief without showing that the last state court to rule on his case failed to apply (or unreasonably applied) "clearly established" federal law as it existed when the state court ruled. Under Petitioner's view, anytime a statute is invalidated, either the state courts would have to permit a new collateral attack or forgo the protection of "clearly established" because there would be no state court decision that is owed deference. *See* 28 U.S.C. § 2254(b)(1). Petitioner would, in effect, allow

habeas petitioners to hold state courts to post-finality decisions invalidating criminal statutes for any reason.

That may have been the law over a century ago, *Linkletter*, 381 U.S. 618, 622–23 (citing *Norton v. Shelby County*, 118 U.S. 425 (1886)), but for over seventy years, the Court has recognized that "[t]he past cannot always be erased by a new judicial declaration." *Id.* at 625 (quoting *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940)).

Petitioner's proposed rule could return a substantial set of state criminal convictions to the pre-*Teague* system of perpetual federal review. The better approach is to scrutinize whether invalidation of a criminal statutes does, in fact, afford a new substantive constitutional protection that, for sake of fundamental fairness, must be applied even to those whose convictions under the same (or a substantially similar) statute are now final.

B. Because many states offer their own procedures for launching collateral attacks on criminal convictions, the impact of abating the rigorous *Teague* standard whenever any statute is declared invalid for any reason would not be limited to collateral review in federal court.

Maintaining strict retroactivity limits under *Teague* is particularly important because, unlike the federal courts under AEDPA, many states permit successive post-conviction collateral attacks on their

convictions and sentences. In other words, while a state prisoner may not file a successive *federal* habeas petition based on a new supposedly substantive constitutional rule without a specific "made retroactive" holding from this Court, *Tyler*, 533 U.S. at 664, no such barrier is in place in many states. In states such as Indiana that have no significant limits on the number of post-conviction relief petitions a prisoner may file, Ind. Post-Conviction Rule 12(b) (permitting the filing of a successive petition upon a showing of "a reasonable possibility" that the petitioner is entitled to relief), the impact of a new and supposedly substantive constitutional rule could be felt right away, even before the Court addresses retroactivity.

Immediate successive-petition impact is particularly significant considering that federal retroactivity doctrine now governs state PCR proceedings. Until recently, that is, States were free to determine for themselves what decisions would be retroactive in their own post-conviction systems. Most states incorporated *Teague*, but some applied different tests. *See, e.g.*, *State v. Smart*, 202 P.3d 1130, 1138–39 (Alaska 2009); *Johnson v. State*, 904 So. 2d 400, 407–09 (Fla. 2005); *State v. Whitfield*, 107 S.W.3d 253, 268 (Mo. 2003); *Colwell v. State*, 59 P.3d 463, 470–71 (Nev. 2002); *Cowell v. Leapley*, 458 N.W.2d 514, 518 (S.D. 1990).

Just this Term, however, the Court held that States *must* apply "*Teague*'s conclusion establishing the retroactivity of new substantive rules[.]" *Montgomery*, 136 S. Ct. at 729 ("The Court now holds

that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

Because the Court has mandated that States apply the *Teague* retroactivity standard, if the Court decides to relax that standard, it will expand the availability of collateral review in State courts as well. Such an expansion could permit many offenders whose convictions and sentences had previously been final to file new petitions for state collateral relief, even in circumstances where the Court itself has not "made retroactive" a new constitutional rule for purposes of AEDPA.

III. Federalism and Comity Outweigh the Attenuated Liberty Interests of Prisoners Convicted of Indisputably Criminal Conduct Under Vague Statutes

Petitioner's position threatens fundamental State sovereign interests without advancing genuine liberty interests of defendants whose final convictions and sentences would be jeopardized.

To begin, it is critical to bear in mind that, by limiting retroactive application, "the *Teague* principle protects not only the reasonable judgments of state courts but also the States' interest in finality[.]" *Beard v. Banks*, 542 U.S. 406, 413 (2004). "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is

essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309.

In many decisions where a criminal statute is invalidated, retroactivity is justified. For example, "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish" should be applied retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). Examples of penalty-focused substantive rules that are always retroactive include prohibitions on executing persons who are under the age of 16 or who have mental disabilities. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988)), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). *Thompson* has been extended to include persons under 18 who receive a death penalty or mandatory life imprisonment without parole. *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Several pre-*Teague* cases cited in Justice Harlan's *Mackey* concurrence are also instructive. For example, cases such as *Street v. New York*, 394 U.S. 576 (1969) (protecting flag burning); *Stanley v. Georgia*, 394 U.S. 557 (1969) (protecting possession of obscene matter); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting use of contraceptives); and *Loving v. Virginia*, 388 U.S. 1 (1967) (protecting interracial marriages) should be applied retroactively. *Mackey v. United States*, 401 U.S. 667, 692 n.7 (1971) (Harlan, J., concurring). Each of those cases placed certain conduct beyond the State's power to punish.

But in the context of void-for-vagueness challenges, the same liberty interests do not arise. In vagueness cases, the problem is not that the statute criminalizes constitutionally protected conduct, but that the statute makes it too difficult to discern precisely *what* constitutes a crime. *Contrast Texas v. Johnson*, 491 U.S. 397, 420 (1989) (reversing conviction for constitutionally protected act of flag burning) *with Connally v. General Constr. Co.*, 269 U.S. 385, 388, 391–92 (1926) (invalidating a statute requiring employers to pay at least "the current rate of per diem wages in the locality") *and United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 86, 91 (1921) (invalidating a prohibition on charging "excessive prices for any necessaries"). Defendants already convicted under the ACCA's residual clause (or analogous statues that may later be deemed unconstitutionally vague) are in prison because they committed acts that legitimately constitute crimes, not because they engaged in constitutionally protected conduct. They do not deserve windfall release simply because those crimes were defined with insufficient specificity.

What is more, the retroactive impact of Johnson would presumably extend to vaguely worded sentence enhancements, the context for *Johnson*. Yet with sentencing enhancements, the implications of vague wording for individual liberty are even more remote. "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999). Sentence enhancements, however, presume valid conviction of an illegal act,

meaning that the defendant decided *not* to conform despite "fair notice" of the crime itself. *See 511 Detroit St., Inc. v. Kelley*, 807 F.2d 1293, 1295 (6th Cir. 1986) ("[P]laintiffs do not appear to have a problem determining when their conduct is criminal, but they complain that they cannot determine with sufficient precision just how criminal it is.").

Other amici have argued that the expectation of, and thus the interest in, finality is lesser "with respect to sentences than with respect to convictions." Br. of Scholars of Federal Courts and Sentencing as *Amici Curiae* in Support of Petitioner at 22. Not so; as the *Teague* plurality noted, "[c]ollateral challenges to the sentence delay the enforcement of the judgment at issue and decrease the possibility that 'there will at some point be the certainty that comes with an end to litigation.'" *Teague*, 489 U.S. at 314 n.2 (quoting *Sanders v. United States*, 373 U.S. 1, 25 (1963) (Harlan, J., dissenting)). And the Court has said before that "the finality concerns underlying Justice Harlan's approach to retroactivity are applicable in the capital sentencing context, as are the two exceptions to his general rule of nonretroactivity." *Penry*, 492 U.S. at 314.

Accordingly, while applying *Johnson* retroactively would undermine States' substantial sovereign interests in the finality of criminal convictions and sentences, retroactivity would offer very little actual protection of individual liberty in return. It is hard to imagine a scenario where someone has been jailed for taking action that, while

understood by prosecutors and jurors to create a "serious potential risk of physical injury to another," is now, after *Johnson*, constitutionally protected. And absent the possibility that a substantial number of such cases may arise, there is no basic unfairness in refusing to undo the convictions and sentences of criminals whose underlying conduct was undoubtedly criminal, even though the legal description of the charge crime (or sentence enhancement) was unconstitutionally broad. In this balance, interests of finality and federalism should prevail.

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In short, making *Johnson* retroactive would also make retroactive any subsequent invalidation of a state penal statute for vagueness. *Montgomery* would incorporate that retroactivity into state post-conviction relief systems, so many more prisoners could collaterally attack their otherwise final convictions and sentences. The result would be a vulnerability of many final state convictions unaccompanied by vindication of any substantive protected liberty interest. There is no compelling reason to impose such disruption on state criminal justice systems.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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